United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,	*Appellant,*	No. 14767
vs.		
HAROLD KENNEDY,	*Appellee.*	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEE

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On Appeal from the United States District Court
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BRIEF OF APPELLEE

JURISDICTION STATEMENT

Appellant's jurisdictional statement is conceded correct by appellee.

RESTATEMENT OF THE CASE

Appellee brought suit against the United States, under the Federal Tort Claims Act, seeking damages for loss of use of his car, personal injuries and property damage, growing out of an automobile collision between appellee's car and a car driven by Staff Sergeant Richard E. Mayer of the U. S. Army, that occurred on the 23rd day of January, 1954, on U. S. Highway No. 99, at a point between the City of Seattle and the City of Tacoma, in the State of Washington. Appellant admitted the negligence of Staff Sergeant Richard E. Mayer (R. 46). Appellant further admitted the following allegation of paragraph III of the Amended Complaint:

"That on the 23rd day of January, 1954, Staff

Sergeant Richard E. Mayer was a member of the Military Forces of the United States, an employee of the *United States of America* * * *. *That at the time of the accident herein referred to said Richard E. Mayer was in fact proceeding as directed and pursuant to that certain order Number 2, dated 5 January, 1954* * * *. (Emphasis supplied)

"That under the terms of said order said Richard E. Mayer was directed to proceed to the Presidio of Monterey, California, and was under the terms of said order, authorized to travel by his privately owned automobile and, under the terms of said order, was entitled to be paid mileage at the rate of 6 cents per mile for the official distance of 1001 miles to the Presidio of Monterey, California; *that the said Richard E. Mayer was in fact so paid for the mileage in question* * * *; *that at the time of the occurrence of the accident hereinafter described said Richard E. Mayer was in fact proceeding to the Presidio of Monterey, California, by his own privately owned automobile.*" (R. 9, R. 10, complaint; R. 46, Answer; R. 48, 49, 50, Findings of Fact.) (Emphasis supplied)

Chief Warrant Officer Cichy, called as expert witness on army matters, testified (R. 60-61) that the language of the order, specifically the abbreviation "T.D.N.," meant that the travel in question is (was) necessary in the interest of the United States (R. 62), or, as he put it in another way, "Travel directed is necessary to comply with the order" (R. 64). The warrant officer also testified that the publishing authority, the officers who signed the order, had a right of control over the movement of Sergeant Mayer on January 23, 1954, and had the power to change his orders

(R. 64); likewise had the power, at any time during the period in question, to direct Sergeant Mayer to go to any different station in the United States; and that, likewise, his superior officer would have a right and power to tell him to proceed by air, or by bicycle, had they so chosen (R. 65). He likewise testified that Staff Sergeant Mayer, while enroute, as he was, pursuant to travel order, was in fact "in the line of duty within the contemplation of the regulation of the United States Army" (R. 65). He also testified that he would be subject to court-martial if he wilfully disobeyed or failed to comply with the order (R. 64). The trial court, in addition to finding the facts heretofore set out, found:

> "The court further finds that on January 23, 1954, the defendant, United States of America, acting through its appropriate officers, could at all times control Staff Sergeant Richard E. Mayer in his actions in the same manner that a private employer might have control over him, had Staff Sergeant Richard E. Mayer been in the employ of such private employer. That the travel herein involved was in the interest of the employer, the United State of America, and necessitated by the interest of the employer and not by the interest of Staff Sergeant Richard E. Mayer; that the work which the employer, the United States of America, desired Staff Sergeant Richard E. Mayer to perform, namely: to study the Chinese-Mandarin language—not for his benefit but for the benefit of the United States of America—created the necessity for the travel herein involved, and that under the law of the State of Washington where this accident happened a private employer would be liable for similar acts committed by his employee."

The trial court entered judgment for appellee against the United States.

SUMMARY OF ARGUMENT

It is the position of the appellee that the only evidence in the case supports the finding of the trial court that Staff Sergeant was at time of the accident an employee of the United States, and acting in line of duty, and within the scope of his employment; that the travel in question was in the interest of his employer, the United States, and not in the interest of Sergeant Mayer; that the necessity for the travel in question stemmed from the interests of the employer, the United States, and not from the servant's desire or interest; that, in point of fact, at the very moment of the collision the servant was engaged in travel as an incident of his master's orders, and for the purpose of serving the United States' interest, and not to serve his own; that, were the United States a private corporation, and were Sergeant Mayer an employee of such private corporation and directed to travel as he was here enjoined to travel, such traveling would be an incident of his employment in the interest of his employer and within the scope of his employment.

It is the position of the appellee that the pleadings in this case, in effect, admit that Sergeant Mayer, at the time of the accident, was an employee of the United States (R. 46); that the undisputed proof shows that at the time of the accident under Army regulations, his conduct was "in line of duty" (R. 65); that it is admitted, under the pleadings and the proof, that at the very moment of the accident Sergeant Mayer was, in

point of fact, complying with the order to proceed, and was, in point of fact, proceeding, pursuant to the order, to the Army Presidio at Monterey, California (R. 46, R. 50).

It is further admitted, and evidence establishes, that the travel in question was necessary to comply with the order in question and in the interest of the United States and not in the interest of or motivated by any private desire on the part of Sergeant Mayer (R. 50).

It is further admitted by the United States that the Master—the United States—did in fact pay for the travel in question (R. 46, R. 49).

It was further undisputed, under the evidence in this case, that the United States—the Master—at the very moment of the accident in question, had the power and right of control over Sergeant Mayer—the servant—by cancelling the order, changing it or modifying it. In short, the Master—the United States—under the evidence in this case had a complete right of control over the servant—Sergeant Mayer (R. 50, R. 65).

The Supreme Court of the United States has stated that the language of the Federal Tort Claims Act, 28 U.S.C.A. 2674 "indicates a Congressional purpose that the United States be treated as if it were a private person in respect of torts committed by its employees." *United States v. Aetna Casualty Co.,* 338 U.S. 366, 70 S. Ct. 207, 210, 94 L. ed. 171.

The law of the place of the accident has been applied to determine the question of scope and course of employment. *Murphy v. United States,* 179 F.(2d) 743, 746 (C.A.9). *United States v. Eleazer,* 179 F.(2d) 914,

917 (C.A.4). *O'Connell v. United States,* 110 F. Supp. 612.

Under the law of the State of Washington, the fact that the servant was driving his own car at the time of the accident does not compel a conclusion that he was not within the scope and course of his employment. See *Rice v. Garl,* 2 Wn.(2d) 403, 409, 98 P.(2d) 920, and cases cited therein. 57 A.L.R. 739, 87 A.L.R. 787, 112 A.L.R. 921.

The established rule in Washington is stated as follows:

> "Where the servant is combining his own business with that of his master or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured; but the master will be held responsible, unless it clearly appears the servant *could not have been directly or indirectly serving his master." Carmin v. Port of Seattle,* 10 Wn.(2d) 139, 116 P.(2d) 338. (Emphasis supplied)

Under Washington law an activity is within the scope of employment if the activity is authorized by the employer either expressly or by fair implication, and in addition to this, the employer is liable if the act complained of was incidental to the acts expressly or impliedly authorized. *Carmin v. Port of Seattle,* 10 Wn. (2) 139, 153, 116 P.(2d) 338. *O'Connell v. United States,* 110 F. Supp. 615.

ARGUMENT IN SUPPORT OF JUDGMENT

In a word, it is the position of the plaintiff that, under the law of the State of Washington governing the doctrine of *respondeat superior* that the defendant, the United States, were it a private employer of Sergeant Mayer under the circumstances of this case would be liable as a matter of fact and law. Judge Driver, in *O'Connell v. United States,* 1950, 110 F. Supp. 613, p. 614, stated:

> "The statutory provision, mentioned above, that when applied to military personnel acting within the scope of their employment when acting in line of duty was not intended to establish a different measure of liability of the United States for the acts of military employees than for the acts of civilian employees. *And at least in this Ninth Circuit, the law of the place where the act occurred is to be applied to determine not only whether the act complained of constituted negligence or actionable wrong, but also whether in doing the act an employee of the United States was acting within the scope of his office or employment. Murphy v. United States,* Ninth Circuit, 179 F.(2d) 743.
>
> "In the State of Washington, where the negligent act occurred, *respondeat superior* is a recognized rule of law. An employer is liable for the negligence of his employee, when a negligent act is committed in the execution of the employer's business within the scope of the employment.
>
> "In applying the rule, the Washington Supreme Court has held that the activities of an employee are within the scope of his employment, if they are authorized by the employer, either expressly or by fair implication from the nature of the duties to be performed."

Judge Driver then goes on to state in the case on the basis of a hypothetical question, that is, assuming that the military man in question was in fact an employee of a private corporation. In this case, the question is, if Sergeant Mayer were an employee of a private corporation, would he have been acting within the scope of his employment by the standards of Washington law at the time the accident occurred? Let us imagine a comparable situation. In this case let us assume that Sergeant Mayer was an employee of a Washington corporation, and that he was told by his employer to go to a distant town to undertake the performance of some type of work on behalf of the corporation. The question would be whether or not, in going to that town in his own private automobile for the purpose of undertaking the private work of the employer, would the employee be within the scope and the course of his employment? Bear in mind that in this case Sergeant Mayer was directed to proceed to the Presidio at Monterey, California, for the purpose of studying the Chinese language. Obviously it was necessary for the United States to have its employee arrive at the Presidio, at Monterey, California, for the express purpose of being educated in the Chinese language. In short, the travel is an incident to the individual's employment. The travel was at the request of and pursuant to the order of the master, the employer. It is in the interest of the employer's business that the travel is incurred, and not for the benefit of the servant, the Sergeant in this case. Let us measure these facts under the principles of Washington law just stated, and the specific cases in which the principles were applied.

The great weight of authority in the United States supports the rule headnoting annotations found in 57 A.L.R. 739; 60 A.L.R. 1163; 87 A.L.R. 783; and 112 A.L.R. 920.

In *Birchfield v. Department of Labor and Industries,* 165 Wash. 106, 4 P.(2d) 858, an employee of stevedoring company was directed by his employer to proceed from Longview, Washington, to Vancouver, Washington, to moor a ship that was to arrive at Vancouver the following day. The employee was left free to use any means of transportation he desired. The only condition being that he should arrive in time to resume his duties as required by the master. The employee was allowed to be reimbursed to the extent of the bus fare between the two towns. The accident occurred in between the two towns while the employee was driving his own car. The sole question in the case was whether such an employee was at that time within the scope of his employment. The Washington court held as matter of law that such an employee was in the scope and course of his employment. In so holding the court said, p. 110:

> "The members of that crew were by the nature of the business, obliged to report at various places where work was to be performed. The men so reporting at such various places of work were allowed transportation charges to and from their home port, but only received pay for the time actually employed. When transferring from one place to another as directed by his employer, the appellant was performing his duty to that employer and was then within the scope of his employment. The transfer from port to port was just

as much a matter of his employment and a duty for him to perform as was the labor which ensued after his arrival. That he was paid the cost of transfer and not wages during the time, is wholly immaterial. The question is: Was he within the scope of his employment?

"It was as much the duty of the crew to move from port to port as it was to perform the work at the port on arrival, and the crew members, while so moving, were as much in the course of their employment as when actually engaged in loading or unloading a ship and earning pay."

In *Hilding v. Dept. of Labor and Industries,* 162 Wash. 168, 298 Pac. 321, a lumber grader driving his own car was injured while returning from Spokane to Asotin, after completing the day's work. The court said:

"At the time the accident occurred, Hilding was acting in furtherance of his employer's business, and hence was in the course of his employment. He was on the most direct route; he was traveling on the highway which he was expected to use."

In *Morris v. Dept. of Labor and Industries,* 179 Wash. 423, 38 P.(2d) 395, a repairman for Puget Sound Power & Light Company was injured while driving home at night, and he was held to be in the course of his employment, even though he had stopped to attend a moving picture show with a young lady before going home.

These are Workmen Compensation cases, but our court has said that the test of whether a workman is in the course of his employment is the same in Workmen Compensation cases as in other cases.

> "Insofar as our Workmen's Compensation Act is concerned, the rules for determining the existence of the relation of employer and employee are the same as those applied at common law for determining the relation of master and servant."
>
> *Hubbard v. Dept. of Labor and Industries,* 98 Wash. 354, at page 358, 167 Pac. 928.

In *Buckley v. Harkins,* 114 Wash. 468, 195 Pac. 250, an automobile salesman driving his own car, was on his way home at the time of the accident after the close of business, and had diverted from his direct route to take another employee to the ferry. The court refused to set aside the verdict of the jury, holding that it was for the jury to decide whether or not the salesman was in the course of his employment. In *Kludas v. Inland-American Printing Company,* 149 Wash. 180, 270 Pac. 429, the accident occurred at 10:00 A.M., and the employee was driving his own car, but both the employee and his superior gave testimony to the effect that the employee was not then on duty for the company but was using the car to do some Christmas shopping. The court held, however, that it was for the jury to decide and refused to set aside a verdict for the plaintiff. In *Thompson v. Dept. of Labor and Industries,* 192 Wash. 501, 73 P.(2d) 1320, employees of Safeway Stores were killed while traveling at night from Coeur d'Alene to Sand Point to investigate the advisability of establishing a meat market in the company's store at Sand Point. They were using an employee's car and had spent the early part of the evening with three young ladies at a tavern. The jury's verdict to the effect that the employees were in the course and scope

of their employment was upheld by the court. In *Dahl v. Moore,* 161 Wash. 503, 297 Pac. 218, a real estate company's saleswoman, driving her own car to a place selected by the master to show real estate, was held in the scope and course of her employment. In *Wilson v. Times Printing Co.,* 158 Wash. 95, 290 Pac. 691, one Maxwell drove his own car, delivering daily and Sunday Times, receiving $98.00 per month salary. The question on appeal was whether or not the publisher of the newspaper was liable under doctrine of *respondeat superior* for Maxwell's negligence. The court held that it was a question for the jury. The court said

> "The test to be applied in this case is, in our judgment, well stated by the late Justice Cardoza, speaking for the New York court in *Mark, defendants, v. Gray,* 251 N.Y. 90, 167 N.E. 181, at page 183:
>
> " 'If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own, *Clausen v. Purcell Motor Car Co.,* 231 N.Y. 273, 131 N.E. 914.
>
> " 'If, however, the work had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been cancelled upon failure of the private purpose, though the business errand was undone, the travel was impersonal and personal the risk.' "

In *Rice v. Garl,* 2 Wn.(2d) 403, 98 P.(2d) 920, the Washington court held:

> "If the workman's place of employment is subject to frequent variable changes of substantial distance, his transportation may be of such im-

portance to both himself and his employer that it is made a part of his employment." (Citing cases herein cited)

In this case, Garl's automobile ran into a minor while Garl was en route in his own automobile from his employer's plant in Seattle to Bellingham. It appeared further that Garl was not to be reimbursed by his employer, the Standard Oil Company, for the travel involved, however, it did appear that it was necessary for him to go to Bellingham to do the work in question. It even appeared that the employer furnished its own truck for transportation. However, as the work involved more than a week, Garl proceeded in his own automobile. The Washington court, citing most of the cases cited herein, held that under the facts herein recited a jury's verdict finding Garl was in the scope and course of his employment should not be disturbed. See also where the rule of *Rice v. Garl* is affirmed in *Melofevich v. Cichy,* 30 Wn.(2d) 702, page 716, 193 P.(2d) 342, and *James v. Ellis,* 44 Wn.(2d) 599, page 605, 269 P.(2d) 573.

In *Purcell v. U. S.,* 130 F.Supp. 882—a case directly in point—the District Court found that the relationship between an officer of the U.S. Army and the United States was that of master and servant, where it appeared that the officer was, at the time of an accident, driving his own automobile with the right of reimbursement and subject to orders in no way differing from the orders in the instant case. The District Court likewise found that under the law of California the officer in question was in the scope of his employment and that the United States was subject to liability to

a third party, under the Federal Tort Claims Act, for the accident in question.

The *Purcell* case presents an excellent discussion of the applicable law of master and servant and adequately distinguishes most of the cases cited in appellant's brief.

We submit that under rules of Washington law governing the doctrine of *respondeat superior* there is simply no question that were the United States a private corporation, and were Sergeant Mayer merely its employee, and were such a private corporation to send Sergeant Mayer to San Diego for the purpose of receiving an education in a particular line of business, and were he either expressly or impliedly given permission to travel by his own automobile and to be reimbursed for the time therefor, and if it further appeared that it was necessary for him to go there to get educated in the master's interest, under the rule of *Rice v. Garl, supra,* and the other cases cited herein, Sergeant Mayer would have been in the course and scope of his employment.

Appellant's major thesis (see pages 10 through 15 appellant's brief) is that at the time of the accident here in question the relationship between the United States and Sergeant Mayer was not that of master and servant, because the United States lacked the right or power to command or direct Sergeant Mayer as to the details of his driving at the time of the accident. Suffice to say that the cases cited by appellant properly state the rule of the jurisdiction herein that arose. However, it is to be noted that all of those cases are

founded upon the case of *Khoury v. Edison Electric Illum'g Co.,* 265 Mass. 236, 164 N.E. 77. Admittedly, this case is directly contrary to the rule of the Washington case of *Rice v. Garl, supra.* As a matter of fact, the *Khoury* case was cited to the Washington court in *Rice v. Garl,* and the Washington court expressly rejected its rule and declined to follow it. (See *Rice v. Garl,* 2 Wn.(2d) 403, p. 411).

As stated in *Purcell v. U.S.,* the case of *U.S. v. Eleazer,* 177 F.(2d) 914 (C.A. 4, 1949), is adequately distinguished in that in that case the trial court found that Lieutenant Tulley, at the date of the accident, "was on his way home for the enjoyment of his deferred leave" (See page 916 of the opinion).

The case of *Reiling v. Missouri Ins. Co.,* 236 Mo. App. 164, 153 S.W.(2d) 79, cited by appellant, is a case wherein the question involved was whether or not the alleged servant was an independent contractor or an employee. In effect, the case followed the *Khoury* rule in distinguishing between an independent contractor and agency relationship. (See *Rice v. Garl, supra.*)

In the case at bar there can properly be no question under the facts to support the theory of independent contractor, and the rules relative to the distinction are immaterial. (*James v. Ellis,* 44 Wn.(2d) 599, p. 605.)

It must be borne in mind that under the pleadings in the case at bar it is admitted:

> "* * * That at the time of the accident herein referred to said Richard E. Mayer was in fact proceeding as directed and pursuant to that certain order Number 2, dated 5 January, 1954 * * *."

> "* * * that said Richard E. Mayer was in fact so paid for the mileage in question * * *; that at the time of the occurrence of the accident hereinafter described said Richard E. Mayer was in fact proceeding to the Presidio of Monterey, California, by his own privately owned automobile."

The Washington court, in *Femling v. Star Publishing Co.,* 195 Wash. 395, 81 P.(2d) 293, which was later reversed on other grounds, stated:

> "But the authorities are practically unanimous in making it clear that the test is right to control, and not actual control, and that the non-existence of actual control is merely evidence upon which to determine the basic fact. The question is not—Did appellant control Norman? but—Could it have controlled him? It is this second question which appellant asks the court to answer, as a matter of law, in the negative.
>
> "We are of the opinion that the jury could well have found that appellant had the right to tell Norman where to go and when to go. We cannot say that it could not also have found that appellant had the right to tell him how to go."

Under the circumstances in this case, on the question of control, it is undisputed that at the time of the accident the United States had an absolute right and power to direct Sergeant Mayer to do anything it chose. It could tell him where to go and how to go, and could, in fact, have changed his orders (see R. 64, 65) and Sergeant Mayer would have been subject to court-martial for disobeyance of any of those orders.

On pages 19 and 20 of appellant's brief, appellant argues that the travel offered by the order was between

Fort Lewis and the Presidio at Monterey, California; that since the accident occurred between Seattle and Fort Lewis, Sergeant Mayer was necessarily on leave status.

Appellant overlooks that, under the pleadings in this case and under the facts, it is admitted that at the time of the accident herein, Sergeant Mayer was, in fact, proceeding as directed and pursuant to the orders in question and was, in fact, paid for the mileage in question.

In the case of *Birchfield v. Dept. of Labor & Industries,* 165 Wash. 106, p. 112, wherein a similar argument was made, the court said:

> "The minority seems to lay considerable stress upon the fact or probability that the appellant, leaving Longview when he did, had several hours of time, more than was necessary to reach the dock in Vancouver at an early morning hour appointed, and that he would or might have gone to his home in the interim. We think that is wholly beside the question and utterly immaterial. Any extra time which appellant might have used for his personal affairs would perhaps make that time and those affairs outside of the course of his employment; but he was not injured during any such outside occupation. It was immaterial to his employer whether, of the intervening hours between the cessation of the work at Longview and its resumption at Vancouver, appellant used the first, the last, or any portion to make the trip. It was his duty to make the trip, and while making the trip at any time during the interval, he was in the course of his employment."

It is what the employee is in fact doing at the time

of the accident that determines his status, and not what he might have been doing.

In the case at bar, it is admitted that the employee was, in fact, proceeding pursuant to the order, for the benefit of the employer and not for his own benefit.

Conceivably, the employee could have been going to a dance or on some frolic of his own, and admittedly a different set of rules of law would apply. However, in the case at bar it is admitted that the employee was on his master's business and acting pursuant to his master's orders and for his master's benefit at the time of the occurrence of the accident. Under such circumstances, appellant's argument is untenable.

Appellant argues that under the Federal Tort Claims Act, the concept "in the line of duty" is more restrictive than the doctrine of *respondeat superior*.

In the case at bar the only evidence as to whether or not Sergeant Mayer was in the line of military duty at the time of the accident is to the effect that he was (see testimony of Warrant Officer Cichy, R. 65). Appellee therefore sees no reason to disputate the merits of appellee's contention because appellee necessarily meets the requirements of both tests.

Appellant asserts that Federal law should control the question of master and servant and its subsidiary rule, scope and course of employment. However, appellant cites no body of Federal law on the subject and, indeed, appellee knows of none.

In this case the statute itself, we believe, directs that the issue be decided in accordance with local law and all of the cases in this Circuit would seem to so hold.

See *Murphy v. U.S.,* 179 F.(2d) 743 (C.A. 9). See also *O'Connell v. United States,* 110 F. Supp. 613, 614.

CONCLUSION

Appellee submits that under the pleadings in this case it is necessarily admitted that the relationship between Sergeant Mayer and the United States at the date of the accident was that of master and servant and that under the facts the trial court was justified in finding from the facts that were admitted in the pleadings that Sergeant Mayer was, at the time of the accident, within the scope and course of his employment and even though more than one inference could be reasonably drawn from the facts relative to the scope and course of employment, the issue is to be resolved by the trier of the facts and not as a matter of law (*Rice v. Garl,* 2 Wn.(2d) 403, 98 P.(2d) 301. *Carmin v. Port of Seattle,* 10 Wn.(2d) 139, 153, 116 P.(2d) 338) and that this court will not disturb the trial court's findings of fact on conflicting inferences unless they are clearly erroneous. (See Rule 52, Rules of Civil Procedure for District Courts.)

It is respectfully submitted that the judgment of the trial court should be affirmed.

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